IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP, et al.,	*	
Plaintiffs,	*	
v.	*	**CA No. 1:17cv01397-TCB**
STATE OF GEORGIA and BRIAN KEMP, Georgia Secretary of State,	*	
Defendant.	*	

DEFENDANTS, STATE OF GEORGIA AND BRIAN KEMP'S BRIEF IN OPPOSITION TO PLAINTIFFS'MOTION FOR A PRELIMINARY INJUNCTION

COME NOW THE STATE OF GEORGIA and BRIAN KEMP, Georgia Secretary of State ("Kemp"), by and through the Attorney General of the State of Georgia, and file this Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction. Doc. 2.

INTRODUCTION AND STATEMENT OF FACTS

On April 18, 2017, a special election was held to fill a vacancy in the Sixth Congressional District. Georgia law requires a candidate for office, including congressional candidates, to secure a majority of the votes cast in the election.

O.C.G.A. § 21-2-501(a)(1). Since no candidate received a majority of the votes cast on April 18, 2018, a run-off is scheduled for June 20, 2017. O.C.G.A. § 21-2-501(a)(5). Georgia law considers run-offs to be a continuation of the initial election contest and mandates that only voters eligible to vote in the initial election are *eligible* to vote in the run-off. Ga. Const. Art. II, § II, Para. II; O.C.G.A. § 21-2-501(a)(10).

Plaintiffs filed this action on April 20, 2017 asserting a violation of the National Voter Registration Act (NVRA), 52 U.S.C. § 20507, and seeking both temporary and permanent injunctive relief. Plaintiffs have brought this action against both the Georgia Secretary of State, in his official capacity, and the State of Georgia.[1]

[1] The State of Georgia is not a proper party for two reasons. First, Plaintiffs brought this action in part pursuant to 42 U.S.C. § 1983. The State of Georgia is not a "person" under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (holding that a "State is not a person within the meaning of §1983."); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1977) (rejecting an award of nominal damages, pursuant to Sec. 1983, against a state officer sued in his official capacity and explaining that a waiver of sovereign immunity was not relevant because "§1983 actions do not lie against a State."). Second, the State of Georgia has Eleventh Amendment immunity from suit. "Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, [ ] a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (citing *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curium)). While an exception to Eleventh Amendment immunity exists under *Ex Parte Young*, 209 U.S. 123 (1908), it is limited to suits against state officers for prospective injunctive relief. *Arizonans for Official English*, 520 U.S. at 69 n.24. There are three ways to override the Eleventh Amendment bar: (1) consent by the state to be sued in federal court on the claim involved; (2) waiver of immunity by a state, or

ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiffs Have Not Met Their Burden of Showing That They are Entitled to a Preliminary Injunction.

A preliminary injunction in advance of trial is an extraordinary measure. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In order to prevail on a motion for preliminary injunction, the movant must show: 1) a substantial likelihood of prevailing on the merits; 2) that the plaintiff will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and 4) that if issued, the injunction would not be adverse to the public interest. *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988); *Levi Strauss and Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982 (11th Cir. 1995). "A preliminary injunction is an 'extraordinary and drastic remedy,' and [Plaintiffs] bears the 'burden of persuasion' to clearly establish all four of these prerequisites. *Wreal, LLC v. Amazon.com*, 840

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(3) abrogation of immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 253 (1985); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-77 (1996). Here, the State of Georgia has neither consented to suit nor waived its immunity. Moreover, Defendants maintain that the NVRA does not abrogate Eleventh Amendment immunity. Because Plaintiffs have also brought this action for injunctive relief against the Secretary of State, in his official capacity, Defendants will address the abrogation issue more fully in later briefing and focus this brief on the merits of Plaintiffs' request for injunctive relief.

F.3d 1244, 1247 (11th Cir. 2016) (citing *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (11th Cir. 1974) (same). Plaintiffs have the burden of establishing their entitlement to a preliminary injunction. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009).

B. The Merits of Plaintiffs' Claim.

The most important factor in deciding whether to grant or withhold a preliminary injunction is the consideration of a plaintiff's likelihood of succeeding on the merits, and a failure to meet this initial hurdle relieves a court from considering the remaining factors. *Church v. City of Huntsville*, 30 F.3d 1332, 1341-45 (11th Cir. 1994). Here, Plaintiffs are not likely to succeed on the merits of their claims.

The central question before the Court is whether the eligibility requirement set out in Ga. Const. Art. II, § II, Para. II and O.C.G.A. § 21-2-501(a)(10) is a voter qualification or a time, place, and manner regulation of the election. While Congress has the final "authority under the Elections Clause to set procedural requirements for registering to vote in federal elections . . . [the] individual states retain the power to set substantive voter qualifications." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1195 (10th Cir. 2014). "[T]he Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them."

Arizona v. The Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2257 (2013). Voter qualifications in elections are left to the states.

Article I, § 2, cl. 1 of the U.S. Const. provides that:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and *the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature*.

(emphasis added). In Georgia, one qualification for voting in run-off elections is that the voter was qualified to vote in the initial contest leading to the run-off. The Georgia Constitution expressly provides that:

> A run-off election shall be a continuation of the general election and only persons who were entitled to vote in the general election shall be entitled to vote therein; and only those votes cast for the persons designated for the runoff shall be counted in the tabulation and canvass of the votes cast.

Ga. Const. Art. II, § II, Para. II. The requirement essentially keeps the electorate in the initial and final contest constant.[2]

The NVRA preempts state law with respect to time, place, and manner regulation of elections but *not* with respect to the qualifications of voters to vote in those elections. The Supreme Court recognized in *Arizona* that "[p]rescribing voting

[2] Prior to election date changes due to the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301, run-off elections in Georgia were held "twenty-one days following a regular or special primary election (and twenty-eight days following a regular or special general election)." *United States v. Georgia*, 952 F. Supp. 2d 1318, 1322 (N.D. Ga. 2013).

qualifications [ ] 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.'" *Arizona*, 133 S. Ct. at 2258 (quoting The Federalist No. 60, at 371). Here, should this Court grant injunctive relief to Plaintiffs, the qualifications for voters in federal run-off elections will differ from those of voters in state run-off elections because state office elections are not affected by the NVRA.

Because Congress has no power to regulate voter qualifications, even with respect to federal offices, this Court should not read the NVRA in a manner that is inconsistent with Georgia's voter qualifications. Because state law declares voters that were not eligible to participate in the April 18, 2017 Special Election, *ineligible* to participate in the continuation of that contest, the NVRA is not violated. The relevant section of the NVRA says that States "shall insure that any *eligible* applicant" can vote in an election. 52 U.S.C. § 20507(a)(1). The NVRA does not define "eligible" and thus, Georgia's law that sets a qualification for voting in the runoff as being eligible to vote in the underlying election does not violate the NVRA.

C. Plaintiffs Cannot Show Irreparable Harm Where There is No Violation of Federal Law.

"A showing of irreparable harm is the '*sine qua non*' of injunctive relief." *Siegel*, 234 F.3d at 1176 (citations omitted). When a plaintiff has not shown a likelihood of success on the merits, claims for irreparable injury have no merit. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Here, Plaintiffs have failed to show irreparable harm because they have not shown a likelihood of success on the merits.

D. The Damage to the Defendants Outweighs Any Alleged Injury to Plaintiff.

On a motion for preliminary injunction, the plaintiff bears the burden of showing that the perceived injury outweighs the damages that the preliminary injunction might cause to the defendants. *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988). "Only in rare instances is the issuance of a mandatory preliminary injunction proper." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979). Additionally, in election cases courts should give consideration to the proximity of the election and the potential for any voter confusion that a last minute change to the State's processes may lead to. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

Here, the interruption to the state's election processes is significant. As the declaration of Chris Harvey, Director of Elections for the State Elections Division of the Office of the Secretary of State, makes clear, making changes to the State's voter registration and elections database regarding voter eligibility requirements for the runoff will require processing changes which would be difficult to complete and test prior to the upcoming election. Exhibit 1 ¶¶ 7-9. In addition, if voter eligibility requirements are changed for the congressional run-off election on June 20, 2016, elections officials in Cobb County will be required to hire temporary workers to quickly process a significant backlog of voter registration applications prior to the beginning of advance voting on May 30, 2017. Exhibit 3 ¶¶ 8, 10, 11, 12. In addition, Cobb County will be administering another election, for State Senate District 32, on May 16, 2017. Exhibit 3 ¶ 6. Changing the eligibility requirements for voting in a runoff for federal office from the eligibility requirements of state office runoffs will also require additional training of polling officials. Exhibit 3 ¶¶ 14-16.

Finally, to the extent that Plaintiffs seek a preliminary injunction of Georgia's run-off eligibility requirements beyond the June 20, 2017 congressional district election, a preliminary injunction would result in general primary run-offs for federal office and state office having different eligibility requirements even while they are scheduled on the same date. O.C.G.A. § 21-2-501(a)(2). Administering both federal and state runoffs on the same day, with different eligibility requirements, would pose significant hardship to elections officials. As explained by Michael Barnes, Director of the Center for Election Systems at Kennesaw State University, if eligibility requirements for voting are different for state and federal offices, election officials will have to administer the two elections separately, even when they occur on the same day. Exhibit 2 ¶¶ 8-9. Harvey echoed Barnes' concerns. Exhibit 1 ¶ 10. The concerns regarding simultaneous general primary runoffs for federal and state office, with different eligibility requirements, is also a significant concern to the local election officials who will be charged with administering the elections. Exhibit 3 ¶¶ 17-19; Exhibit 4 ¶¶ 4-8.

E. The Preliminary Injunction Will Not Serve the Public Interest

A plaintiff also bears the burden of showing that the preliminary injunction would serve the public interest. *Baker*, 856 F.2d at 169. Here, as demonstrated by the testimony discussed in Sec. D above, the public interest weighs heavily *against* the issuance of an injunction.

CONCLUSION

As Plaintiffs cannot satisfy the requirements for a preliminary injunction, their request for a preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Defendant's Response to Plaintiffs' Motion for Preliminary Injunction were prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

Certificate of Service

I hereby certify that on April 28, 2017, I electronically filed Defendants Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: NONE

This 28 day of April, 2017.

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